IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8161 OF 2007

Shri Maruti Mahadeo Nigde and
Ors. ...Petitioners

Versus

Shri Umesh Maruti Nigde and anr. ....Respondents

A.B.Borkar, Adv. for the petitioners.

S.M.Mirajkar and S.M.Kamble Adv. for respondent nos. 1 and 2.

CORAM: S.C.DHARMADHIKARI, J.

18th December, 2007.

P.C. :

1. The Writ Petition challenges concurrent orders at an inter-locutory stage. The petitioners are the original Defendant Nos.1 to 7 and respondent nos.1 and

2 are the original plaintiffs. The suit being Special Civil Suit No. 142 of 2007 is filed in the court of Learned Civil Judge Senior Division, Kolhapur for partition, declaration and injunction in respect of the suit properties.

2. An application for interim injunction was made by Respondent nos.1 and 2. The injunction was sought with regard to Revision Survey No.167/10 and Revision Survey No.174/4 to the extent indicated in para 1 of the plaint at Serial Nos.2 and 7.

3. The basis of te interim injunction as sought, is that, the original defendant no.1 was the husband of the plaintiff no.2/respondent no.2 before me, whereas, respondent no.1/original plaintiff no.1 is his son. The defendant no.1 has after the marriage, failed and neglected to look after his wife and son. They applied for maintenance under Section 125 of the Code of Criminal Procedure and the proceedings date back to about 1982. Maintenance was granted in favour of both. The Revision Application preferred by the said Defendant no.1/petitioner no.1 before me has been

dismissed. The case is that he has left the said village and residing elsewhere. He has been avoiding to fulfil his obligations towards his wife and son. The plaint averments proceed on the basis that the respondent nos.1 and 2/original plaintiffs are in possession of the subject lands/portions thereof. Their case is that these lands have come to the share of the defendant no.1 upon a partition dating back to 1986 between the defendants inter-se. A zerox copy of the original partition deed was produced before the courts below. Upon perusal of this partition deed, the courts below held thus :-

> "15. The plaintiffs have relied on the deed of partition even though it is unregistered in zerox copy but the plaintiff has already cleared doubt that, he received the zerox copy of the original partition deed. The perusal of this partition deed, it shows that the land R.S.No.167/1C total admeasuring 12 R out of which 6 R and land Revision No.174/4 total admeasuring 26 R eastern side 13 R land thus, the total 19 R land and the houses new two rooms constructed were shown allotted to the share of Defendant no.1. The House of G.P.No.748, 10 guntha land out of 20 gunthas land from R.S.No. 197/4 and 8.1/2 guntha R land out of R.S.No.198/4 has been allotted to the share of the Defendant no.3. The property allotted to the share of Defendant no.2 is that 4.1/2 guntha land out of R.S. no.167/23, 3 guntha land out of R.S.No.174/19 1.1/2 guntha land out of R.S.No.174/22, 5 guntha

land out of R.S.No. 167/16 and the house property for residence out of house no.748. The stamp has been purchased for the sale deed by the Defendant no.4 and the ferfar No. 4891 supports the fact that such partition has been acted upon. Therefore, there is substance in the plaintiffs case that the partition has been effected in the year 1986. The plaintiffs further case is relevant. That his case of partition and possession of the suit property is relevant undisputedly the Defendant no.1 and the plaintiff no.2 have no good relations. The plaintiff no.2 have herself, and the plaintiff no.1, being son and the Defendant no.8 being daughter filed criminal Misc.Application No.164/82 in the court of C.J.M., Kolhapur and obtained the order of maintenance. The revision against it has been dismissed. This fact is not denied by the defendants side. According to the plaintiff the defendant no.1 is residing elsewhere and he is served on different address. They are residing in new two rooms and cultivating the lands allotted to the share of the Defendant no.1. The deed of partition is unregistered and in zerox copy, it can not be the ground to discard the plaintiffs case of possession of the suit property.

16. Regarding possession of the suit property various documents brought on record by the Plaintiff his application dated 1.03.2002 at paper book page no. 273 is addressed to the Chairman Hanuman Pani Purvatha Sanstha Uchgaon wherein, he has complaint about the flow of water for the other lands through his land R.S.No.174/04. Further the application dated 11/03/2003 is addressed to the Chairman Panchayat Samittee Karvir, wherein he has requested to provide him the spray pumps. The plaintiffs application dated 21.01.2003 is addressed to the Tahsildar Karvir, with request to remove the encroachment and obstruction in his possession and cultivation of the land R.S.No.

> 174/4, admeasuring 13 gunthas. The Tahsildar Office by letter dated 18.12.2005 replied the application helplessly to remove the encroachment etc.
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> 17. Besides that the plaintiff brought on record the various receipts regarding water tax paid by him to the Hanuman Sahakari Pani Purvatha Sanstha from page 245 to 253 of paper-book. These receipts of dated 15.04.2002, 6.3.2003, 31.01.2005, 16.6.2006 respectively. Besides that the plaintiff has brought on record the Government cess paid by the plaintiff at paper book page no. 231 to 243. All these documents are enough to infer that the plaintiffs have possession and cultivation of the suit property and residence in the two new rooms constructed as per the property allotted to the share of the Defendant no.1, in the partition of the year 1986."

4. It is on tis basis that the courts concurred and granted interim injunction restraining the present petitioners from disturbing possession of respondent nos.1 and 2 with regard to these lands.

5. These orders are under challenge before me.

6. Mr.Borkar, appearing for the petitioners/original defendants contended that the courts below have failed to notice that the injunction

as prayed could not have been granted. He relies upon the plaint and the prayers therein , to urge that when the suit is for declaration of the share, partition and separate possession, then, without any averments regarding the physical possession and protection thereof, the petitioners could not have been restrained in the manner done by the Trial Court. In other words, there could not have been an interim injunction to protect the plaintiffs possession when they themselves urge that they are not in and claim possession. In such circumstances, the courts below have committed an error apparent on the face of the record and their orders are therefore vitiated and deserve to be quashed and set aside.

7. Further, it is his submission that assuming that there is a zerox copy of the partition deed of 1986 on record that is between the defendants inter-se. The defendant no.1 has some share in respect of these lands as evidenced by the partition deed. The original plaintiffs could have claimed only that share and nothing else. In such circumstances, without that share being demarcated and ascertained, no question of

any injunction in favour of the respondent nos.1 and 2 can arise at this stage.

8. I have perused the petition and the Annexures thereto including the plaint. I have also perused the impugned orders. To my mind, the plaint averments at this prima-facie stage must be read as a whole. Merely relying upon the relief clauses and contending that there is no prayer therein to protect the physical possession, would not be fair, just and proper. Admittedly, both sides argued with regard to the contents of the partition deed, zerox copy of which was produced even at the inter-locutory stage. In such circumstances, when the courts below place reliance upon the contents of the partition deed, so also, other documents which evidence physical possession of the respondent nos.1 and 2 in the suit properties to the extent indicated in the plaint, does not mean that no relief could have been granted at all to protect, not only, the rights but the possession of Respondent nos.1 and 2. This is not a court of further appeal. I cannot re-appreciate and re-appraise the materials produced at the prima-facie stage and come to a

different conclusion. More so, when it is possible and probable from the contents of the documents that defendant no.1 who was away from the village and has not cohabitated with the original plaintiff no.2 for a long time, that the rooms/structure have been in possession of the respondent nos.1 and 2, so also, they are cultivating the lands for their livelihood. To that extent they must be protected. This is not a case of an injunction being granted to restrain co-owners from enjoyment of the property which has come to their share. This is a case where relying upon the partition deed, a prima-facie conclusion is reached with regard to the physical partition and separate possession of portion of the lands. When protecting the parties, there is no question of injunction restraining the co-owners as contended by Mr.Borkar. I am unable to also uphold this submission, that, in the absence of any prayer with regard to the physical possession being disturbed, the Trial court and the Lower Appellate Court could not have granted any relief. As contended by Mr. Mirajkar, once the plaint averments are read as a whole and when there is a reference to the documents, so also the partition therein, then, mere absence of

appropriate relief clause would not be fatal.

9. In the light of the above, there is no substance in this Writ Petition and it is accordingly dismissed. No order as to costs. However, the order of injunction must be read in the light of the contents of para no.1 at Serial Nos.2 and 7 of the plaint and the portion covered therein.

10. All observations made by me, as well as, by the courts below are tentative and prima-facie and shall not influence the decision in the suit.

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